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ON MILITARY COMMISSIONS

Scott L. Silliman[†]

I. Introduction

With pretrial hearings for several detainees underway at Guantanamo Bay, and the prospect for full trials before military commissions¹ starting either late this year or early in 2005, this little-understood option for prosecuting terrorists has become the focus of intense debate within this country and abroad, even becoming an election year issue for the presidential contenders.² Many have suggested that the military commission procedures should have grafted in more of the due process protections afforded in courts-martial under the Uniform Code of Military Justice,³ the criminal justice system created by Congress to govern the conduct of our own service men and women,⁴ even though the commissions will be used only for non-resident aliens. Others question whether the

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¹ Although many commentators have referred to the proceedings at Guantanamo Bay as military "tribunals", the more correct term is military "commissions" since military tribunals encompass not only commissions, but also courts-martial, provost courts, and courts of inquiry. See 10 U.S.C.S. § 821 (2004).

² Senator Kerry has indicated that he would "scrap the military commissions created by President Bush to try suspected al Qaeda and Taliban fighters detained at Guantanamo Bay, Cuba, and would instead establish a new system modeled on military courts-martial." Glenn Kessler, *Kerry Would Drop Detainee Commissions*, WASH. POST, Sept. 1, 2004, at A07.

³ See 10 U.S.C.S. §§ 801-946 (2004).

⁴ See, e.g., American Bar Association Resolution 8C, contained in The Summary of Action Taken by the House of Delegates of the American Bar Association, Karen J. Mathis, Chair, Presiding, Philadelphia, Pennsylvania, February 4-5, 2002; and AMERICAN BAR ASSOCIATION TASK FORCE ON TERRORISM AND THE LAW, Report and Recommendations on Military Commissions (hereinafter ABA Task Force); January 4, 2002 available at <http://abanet.org/leadership/military.pdf>. Regrettably, some, even our highest officials, tend to confuse military commissions and courts-martial. White House Counsel Alberto Gonzalez was the featured speaker at an ABA-sponsored luncheon in Washington DC on November 30, 2001. When asked by a member of the press how he would respond to allegations regarding the unfairness of the military commissions, he responded that there was a rich 50 year history of military justice which should disprove that allegation. Military justice is, of course, the statutory system of justice under the Uniform Code of Military Justice and quite distinct from the presidentially created military commission system.

proceedings at Guantanamo Bay should comply, even minimally, with constitutional requirements, and most commentators have assailed the lack of any type of *judicial* review of military commission convictions.⁵

But what are these military commissions, and from where do they derive their authority? This brief note is intended only as a primer on the current military commission system for those not familiar with it, highlighting some of the key issues at the center of the debate.

II. Early Commissions

This country has a rich historical tradition of trying by military commission those accused of violations of the law of war when the civil courts are either not open or considered not suitable.⁶ One of the first was the trial of Major John Andre, Adjutant-General to the British Army, in 1780 on a charge that he had crossed the battle lines to meet with Benedict Arnold and had been captured in disguise and while using an assumed name.⁷ Many others were conducted during the Revolutionary War period, as well as during the Mexican and Civil Wars.⁸ Two of the most recent, and perhaps of greatest relevance to an analysis of the Guantanamo Bay commissions, were conducted during World War II. In the first, after the declaration of war between the United States and Germany, eight Nazi saboteurs disembarked from two German submarines at Amagansett Beach on Long Island and at Ponte Vedra Beach in Florida, respectively, and proceeded to bury their uniforms and don civilian attire.⁹ They thereafter set about to sabotage war industries and war facilities in this country, but were quickly captured and prosecuted by a military commission convened by President Roosevelt and held in Washington DC.¹⁰ All eight were

⁵ Convictions by military commissions are reviewed by a Review Panel consisting of three military officers (including civilians specially appointed as military officers for that purpose), one of which must have experience as a judge. The Review Panel is empowered to forward the case to the Secretary of Defense with a recommendation as to disposition or to return the case to the Appointing Authority (the official who appoints the commission) for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred. DEP'T OF DEF. MILITARY COMMISSION ORDER NO. 1, para. 6(H)(4), Mar. 21, 2002, *available at* <http://www.defenselink.mil/news/commissions.htm> (last visited Mar. 1, 2005).

⁶ LOUIS FISHER, *PRESIDENTIAL WAR POWER* 205 (2d ed. 2004).

⁷ *Ex Parte Quirin*, 317 U.S. 1, 41 n. 14 (1942).

⁸ See *id.* at 32 n. 10.

⁹ *Id.* at 21.

¹⁰ LOUIS FISHER, *NAZI SABOTEURS ON TRIAL* 25, 35, & 50 (2003).

convicted, and six of the eight were electrocuted only five days after being sentenced to death by the commission.¹¹

The Supreme Court, in the context of reviewing the district court's denial of petitions for habeas corpus, issued a carefully limited ruling affirming the government's power to detain and try the saboteurs by military commission under the circumstances presented.¹² In the second, after the surrender of Germany but before the surrender of Japan, twenty-one German nationals were convicted by a military commission sitting in China of violating the laws of war by collecting and furnishing to the Japanese armed forces intelligence concerning American forces and their movements.¹³ They were sentenced to prison terms and relocated to occupied Germany to serve them.¹⁴ The Supreme Court, again in the context of a district court denial of petitions for habeas corpus, held that enemy aliens, who at no relevant time and in no stage of their captivity had been within our territorial jurisdiction, had no constitutional right to access our courts.¹⁵ The Court also reiterated that a military commission is a lawful tribunal to adjudge enemy offenses against the laws of war.¹⁶

The military commissions which gave rise to both the *Quirin* and *Eisentrager* cases, as well as the one used to prosecute General Yamashita, the Commanding General of the Imperial Japanese Army in the Philippines,¹⁷ were *war courts*, one of three types of military commissions.¹⁸ The other two types of commissions are *martial law courts*, such as those used during the Civil War in *Ex parte Milligan*¹⁹ and in World War II in *Duncan v. Kahanamoku*;²⁰ and *occupation courts*, such as the one

¹¹ *Id.* at 79.

¹² "We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform—an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission". *Quirin*, 317 U.S. at 45-46.

¹³ *Johnson v. Eisentrager*, 339 U.S. 763, 766 (1950).

¹⁴ *Id.*

¹⁵ *Id.* at 777-778.

¹⁶ *See generally id.* at 785.

¹⁷ *In Re Yamashita*, 327 U.S. 1, 5 (1946).

¹⁸ Maj. Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW., Mar. 2002, at 19, 37.

¹⁹ 71 U.S. 2 (4 Wall.) (1866).

²⁰ 327 U.S. 304, 307 (1946).

used in *Madsen v. Kinsella*²¹ for the trial of an American dependent wife charged with murdering her husband in occupied Germany in violation of the German criminal code. The military commissions currently being used at Guantanamo Bay are of the first type, *war courts*.

III. Who Can Authorize Military Commissions: The President or Congress?

One of the principal points of contention immediately following the promulgation of President Bush's Military Order of November 13, 2001 authorizing military commissions²² was whether he had the authority, without specific congressional approval, to do so.²³ I believe he did, and that it flowed directly from his constitutional authority as Commander-in-Chief.²⁴ It is significant that the Military Order was styled exactly as such-a *military* order-rather than the much more commonly used title *executive* order. Further, the first paragraph of the order clearly emphasizes the President's authority as Commander in Chief of the Armed Forces, as against the later references to supporting statutes.²⁵ As to the statutory references cited,²⁶ only one of the three could arguably be construed as even suggesting a congressional grant of authority to the President to authorize commissions, but a closer analysis renders that claim dubious.

In the Authorization for Use of Military Force Joint Resolution of September 18, 2001, the first law cited, the key operative language is

²¹ 343 U.S. 341, 343 (1952).

²² Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (2001) (hereinafter Military Order).

²³ See, e.g., *Department Of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Before the Senate Comm. On the Judiciary* 107th Cong. 107-74 (2001) (statements of Scott Silliman, Executive Director, Center on Law, Ethics, and National Security, Duke University School of Law and Neal Katyal, Visiting Professor Yale Law School, Professor of Law, Georgetown University); Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 3 249 (2002).

²⁴ See U.S. Const. art II, § 2, cl. 1. Colonel Winthrop's respected commentary gives support to this argument: "The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-Chief in war. In some instances...Congress has specifically recognized the military commission as a proper war-court, and in terms provided for the trial thereby of certain offences. In general, however, it has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war and other offenses not cognizable by court-martial." WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS*, 831 (2d ed., 1920).

²⁵ Military Order, *supra*, note 22.

²⁶ See generally Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); 10 U.S.C.S. § 821 (2004); 10 U.S.C.S. § 836 (2004).

contained in Section 2(a) which clearly authorizes the President to use force,²⁷ but does not go so far as to empower him to conduct military commissions to prosecute those captured.²⁸ The third statutory reference, Article 36 of the Uniform Code of Military Justice, is simply a general delegation of authority to the President to prescribe trial procedures, including modes of proof, for courts-martial, military commissions, and other military tribunals and states that he should, “so far as he considers practicable, apply the principles of law and rules of evidence” generally used in criminal cases in federal district courts.²⁹ Rather than citing this provision as empowering him to authorize military commissions, the President clearly intended it to refer to his decision that use of those principles of law and rules of evidence was *not* practicable “given the danger to the safety of the United States and the nature of international terrorism.”³⁰ The second cited law, Article 21 of the Uniform Code of Military Justice,³¹ is the one which has drawn the most attention with regard to the President’s authorization of military commissions.

Under the Constitution, Congress was granted authority to make rules for the government of the land and naval forces³² and it did so most recently through enactment of the Uniform Code of Military Justice,³³ of which

²⁷ “That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on Sept 11, 2001, or harbored such organizations or persons, in order to prevent future acts of international terrorism against the United States by such nations, organizations or persons.” 107 Pub. L. 40, 115 Stat. 224, at 2(a).

²⁸ In the Supreme Court decision regarding a petition for habeas corpus filed on behalf of Yaser Hamdi, an American citizen designated by the President as an “enemy combatant” and held without charges or access to counsel for over two years at a naval brig in Charleston, South Carolina, five justices (O’Connor, Rehnquist, Kennedy and Breyer for the majority, Souter and Ginsburg concurring, and Scalia, Stevens, and Thomas in dissent) believed that the Resolution was sufficient to satisfy the requirements of the non-detention statute, 18 U.S.C. § 4001(a), for purposes of legitimizing Hamdi’s detention under the circumstances, but even in so holding the Court ruled that he had the right to challenge that detention before a “neutral decisionmaker”. Since Hamdi, as an American citizen, was outside the parameters of the Military Order, the Court obviously did not address the issue of whether the Resolution could be construed to authorize anything other than detention. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639-2640, 2678 (2004).

²⁹ 10 U.S.C.S. § 836 (2004).

³⁰ Military Order, *supra* note 22, at § 1(f).

³¹ 10 U.S.C.S. § 821 (2004).

³² U.S. CONST. art I, § 8, cl. 14. This clause is distinctly different in purpose from article I, § 8, clause 10 which gives Congress the authority to define and punish offenses against the law of nations, of which the law of war is a subset. *See* note 42, *infra*, and accompanying text.

³³ *See* 10 U.S.C.S. §§ 801-946 (2004).

Article 21 is a part. That section of the military code, entitled "Jurisdiction of courts-martial not exclusive," states:

"The provisions of this chapter [] conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders and offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."³⁴

This section is virtually identical in wording to its predecessor, Article 15 of the Articles of War,³⁵ which, when newly enacted in 1916, was the subject of hearings in the Senate Subcommittee on Military Affairs. The testimony of Army Brigadier General Crowder, then Judge Advocate General of the Army, before the subcommittee is instructive:

"General Crowder: Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is *recognized* by statute law. As long as the articles embraced them in the designation "persons subject to military law," and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced . . . It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient . . . Yet, as I have said, these war courts never have been formally authorized by statute.

Senator Colt. They grew out of usage and necessity?

Gen. Crowder. Out of usage and necessity. I thought it was just as well, as inquiries would arise, to put this information in the record." (Emphasis added).³⁶

³⁴ 10 U.S.C. § 821 (2005).

³⁵ "Art 15. NOT EXCLUSIVE. - The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals." Articles of War, ch. 418, 39 Stat. 650, 653 (1916).

³⁶ *Preparedness for National Defense: Hearing Before the Senate Committee on Military Affairs*, 1916 Leg., 64th Cong. 64-1 (1916) (Testimony of Brigadier General Enoch H. Crowder, United States Army, Judge Advocate General of the Army, Feb. 7, 1916).

What is clear from General Crowder's testimony is that Article 15 of the Articles of War (and its successor, Article 21 of the Uniform Code of Military Justice) was not meant to constitute any grant of authority from Congress to the President with regard to military commissions. Rather, it was meant only to ensure that military commissions, predicated not upon a specific statutory grant but rather upon historical usage under the President's Commander-in-Chief authority, were not divested of their jurisdiction because of the creation of a new court-martial system which would have overlapping jurisdictional coverage. The word "recognized" is key to an accurate understanding because it implies only acknowledgment, not establishment. Interestingly, the wording from Chief Justice Stone's opinion in *Quirin* is similar³⁷ in discussing the legal predicate for President Roosevelt's executive order authorizing a military commission for the Nazi saboteurs.

It is worth remembering that Roosevelt's executive order was issued incident to a congressionally declared war in which the president's authority as Commander-in-Chief was at its maximum,³⁸ and therefore the Court's discussion of presidential power as supported by congressional mandate vis-a-vis military commissions must be considered more broadly than just with reference to Article 15 of the Articles of War.³⁹ Further, *Quirin* specifically left open the question of whether the President alone had authority to authorize military commissions, quite apart from any act of Congress,⁴⁰ but the Supreme Court later answered that in the affirmative in *Madsen v. Kinsella*⁴¹ in the context of its discussion of the legality of an occupation court in Germany.

³⁷ "But the Articles also *recognize* the 'military commission' appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial." (Emphasis added). *Quirin*, 317 U.S. at 41.

³⁸ Cf. Justice Jackson's first category in his discussion of the balance of presidential powers in the Steel Seizure case; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

³⁹ "The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of the war and for the government and regulation of the Armed Forces, and all the laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war." *Quirin*, 317 U.S. at 26.

⁴⁰ "It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation." *Id.*, at 29.

⁴¹ "In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States." *Madsen*, 343 U.S. 341, 348.

Since Congress has not attempted to legislate with regard to military commissions following President Bush's Military Order,⁴² and since the only applicable statute (Article 21 of the Uniform Code of Military Justice) simply *recognizes* the previously existing jurisdiction of military commissions under common law, President Bush, as Commander-in-Chief, has clear authority to authorize the use of commissions, as he did on November 13, 2001.

IV. Procedures for Military Commissions At Guantanamo Bay

The Military Order, standing alone, reflects a paucity of due process, whether measured by domestic or international law standards;⁴³ but some four months later, perhaps in response to widespread criticism, the Secretary of Defense promulgated a much more detailed set of procedures which included many of the protections afforded in the Uniform Code of Military Justice.⁴⁴ Significant differences still exist, though, between those used in military commissions and those used in courts-martial, notably the

⁴² Although article I, § 8, clause 10 of the Constitution authorizes Congress to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations, it has done so with regard to the latter in a very limited manner, most notably in the War Crimes Act of 1996, 18 U.S.C.S. § 2441, which makes punishable in our federal courts violations of a number of international treaties wherever the perpetrator or the victim is a member of our armed forces or a national of the United States. Congress has clearly not used this clause, which would be the more appropriate grant of authority, to legislate in the area of military commissions.

⁴³ Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 338 n.7 & 9 (2002). The Order provides only for (a) a full and fair trial, with the military commission sitting as triers of both fact and law; (b) admission of evidence that would have probative value to a reasonable person; (c) procedures for safeguarding classified information; (d) provision for the designation of prosecution and defense attorneys; (e) conviction and sentencing upon the concurrence of only two-thirds of the commission members; and (f) administrative review and final decision by either the President or, if designated, by the Secretary of Defense. Military Order, *supra* note 22, § 4(c)(2-8).

⁴⁴ See DEP'T OF DEF. MILITARY COMMISSION ORDER NO. 1, Mar. 21, 2002, *supra* note 5, at § 5A-5P. This order added, among other things, provision for the accused to be furnished a copy of the charges in advance of trial; a presumption of innocence until proven guilty; a "beyond a reasonable doubt" standard for findings of guilt; detailing of a defense counsel before and throughout the trial; a requirement for the prosecution to make evidence available to the defense which is either exculpatory or which it intends to introduce at trial; formal acknowledgment that the accused is not required to testify during trial and that no adverse inference can be drawn from the decision not to testify; the right of the accused to testify in his own defense, if he so elects; the right of the accused to obtain witnesses and present evidence; the right to an interpreter; the right of the accused to be present at trial, unless he engages in disruptive behavior (but his defense counsel may not be excluded); the right to make a statement and submit evidence before sentencing; a public trial, unless it must be closed because of classified evidence; and a provision against double jeopardy.

fact that a civilian defense attorney representing an accused before a commission must be a United States citizen;⁴⁵ there is no “judge” for the military commission, only a legal officer who serves as part of the panel as the “presiding officer” and who has limited independent duties;⁴⁶ and there is no provision for judicial review of military commissions.⁴⁷ Finally, a series of nine Military Commission Instructions⁴⁸ gives more precise definition and detail to the procedural rules set out in Military Commission Order No. 1. Also, the Secretary of Defense has appointed those responsible for administering the military commission system,⁴⁹ and the panel members of the military commission itself have been selected.⁵⁰

⁴⁵ Compare DEP’T OF DEF. MILITARY COMMISSION ORDER NO. 1, *id.* at § 4(C)(3) with MANUAL FOR COURTS-MARTIAL, R.C.M. § 502(d)(3) (2002) available at <http://www.usapa.army.mil/pdfiles/mcm2002.pdf> [hereinafter MANUAL]. It is possible that foreign attorneys, properly credentialed in their own countries, might be allowed to participate as “consultants” to the defense team, but MILITARY COMMISSION ORDER NO. 1 would appear to preclude a non-U.S. citizen from actually participating in an active defense role at the trial.

⁴⁶ Compare DEP’T OF DEF. MILITARY COMMISSION ORDER NO. 1, *id.* at § 4(A)(1) with MANUAL, *supra* note 45 at R.C.M. § 801.

⁴⁷ Compare DEP’T OF DEF. MILITARY COMMISSION ORDER NO. 1, *id.* at § 6H(4-6) with MANUAL, *supra* note 45 at R.C.M. § 1203-1205.

⁴⁸ DEP’T OF DEF. MILITARY COMMISSION INSTRUCTION NO. 1, MILITARY COMMISSION INSTRUCTIONS, (Apr. 30, 2003); DEP’T OF DEF. MILITARY COMMISSION INSTRUCTION NO. 2, CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION (Apr. 30, 2003); DEP’T OF DEF. MILITARY COMMISSION INSTRUCTION NO. 3, RESPONSIBILITIES OF THE CHIEF PROSECUTOR, DEPUTY CHIEF PROSECUTOR, PROSECUTOR, AND ASSISTANT PROSECUTORS, (Apr. 15, 2004); DEP’T OF DEF. MILITARY COMMISSION INSTRUCTION NO. 4, RESPONSIBILITIES OF THE CHIEF DEFENSE COUNSEL, DEPUTY CHIEF DEFENSE COUNSEL, DETAILED DEFENSE COUNSEL, AND CIVILIAN DEFENSE COUNSEL, (Apr. 15, 2004); DEP’T OF DEF. MILITARY COMMISSION INSTRUCTION NO. 5, QUALIFICATION OF CIVILIAN DEFENSE COUNSEL, (Apr. 30, 2003); DEP’T OF DEF. MILITARY COMMISSION INSTRUCTION NO. 6, REPORTING RELATIONSHIPS FOR MILITARY COMMISSION PERSONNEL, (Apr. 15, 2004); DEP’T OF DEF. MILITARY COMMISSION INSTRUCTION NO. 7, SENTENCING, (Apr. 30, 2003); DEP’T OF DEF. MILITARY COMMISSION INSTRUCTION NO. 8, ADMINISTRATIVE PROCEDURES, (Apr. 30, 2003); and DEP’T OF DEF. MILITARY COMMISSION INSTRUCTION NO. 9, REVIEW OF MILITARY COMMISSION PROCEEDINGS, (Dec. 26, 2003); all available at <http://www.defenselink.mil/news/commissions.html>.

⁴⁹ Retired Army Maj. General John D. Altenburg, Jr., a former Assistant Judge Advocate General of the United States Army, has replaced Deputy Secretary of Defense Wolfowitz as the Appointing Authority; Retired Air Force Brig. Gen. Thomas L. Hemingway was recalled to active duty and is the Deputy Appointing Authority as well as Legal Advisor to the Appointing Authority; Army Col. Robert L. Swann has replaced Army Col. Fred Borch as the Chief Prosecutor; Air Force Col. Will A. Gunn is the Chief Defense Counsel; and former Attorney General Griffin B. Bell, former Secretary of Transportation William T. Coleman, Jr., Chief Justice Frank J. Williams of the Rhode Island Supreme Court, and former Judge of the Court of Common Pleas (Bucks County, Pennsylvania) Edward G. Biester, Jr., have all been named as review panel members for military commissions. See DEP’T OF DEF.,

V. Judicial Review of Commission Proceedings: A Door Left Partially Open

As previously noted, one of the most criticized aspects of the military commission system is the lack of any provision for *judicial* review of convictions.⁵¹ That was expressly prohibited by the terms of the Military Order,⁵² and although such language might be construed as an attempt to suspend the Writ of Habeas Corpus, it could not have that effect in light of clear Supreme Court precedent.⁵³ Short of that, the Bush administration has relied heavily upon the Supreme Court's 1950 decision in *Eisentrager*⁵⁴ to argue that there should be no judicial review of the activities at Guantanamo Bay, be it detention or trial by military commission, because the Constitution affords no access to our courts to the non-resident aliens held there. Nonetheless, the Court granted certiorari in the fall of 2003 in a case filed on behalf of two Australian and twelve Kuwaiti detainees whose petitions for habeas corpus had been denied.⁵⁵ Notwithstanding the very limited scope of the grant (to the jurisdictional issue only), it was assumed that the Court would necessarily have to look at the continued vitality of *Eisentrager* in a new context—the “War against Terrorism.” It did not. The Court skirted the constitutional issue by finding a statutory basis for habeas review which, because of prior case law, did not exist in 1950. Further, it

MILITARY COMMISSION ORDER NOS. 4-6 (Jan.30, 2004, Mar. 15, 2004, Mar. 26, 2004); Briefing, Department of Defense Background Briefing. (Dec. 1, 2003) (Federal News Service).

⁵⁰ The Presiding Officer is retired Army Col. Peter E. Brownbeck, a former Army judge advocate recalled to active duty for this purpose, with the other panel members being Marine Col. Jack Sparks, Jr., Marine Col. R. Thomas Bright, Air Force Lt. Col. Timothy Toomey, and Air Force Col. Christopher Bogdan. Toni Locy, *Guantanamo Hearings Start Today*, USA TODAY, Aug. 24, 2004, at 4A.

⁵¹ See *supra* note 5 and accompanying text.

⁵² “With respect to any individual subject to this order – (1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal”. DEP’T OF DEF. MILITARY COMMISSION ORDER NO. 1, *supra* note 22, at § 7(b).

⁵³ ABA TASK FORCE, *supra* note 4, at 11 (citing *Madsen v. Kinsella, Application of Yamashita* and *Ex Parte Quirin*).

⁵⁴ *Eisentrager*, 339 U.S. at 775-79, 790-91.

⁵⁵ *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted sub nom; Rasul v. Bush*, 540 U.S. 1003 (2003), granting on the limited question: “[w]hether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Bay, Cuba.”

left for later resolution the nature and scope of habeas proceedings in the lower courts.⁵⁶ Interestingly, in *Rasul*, an amicus brief filed by a number of the military attorneys assigned to defend the detainees before military commissions urged the court, in what was clearly only a detention issue case, not to adopt a blanket approach which would preclude a case-by-case review for those facing commissions.⁵⁷ The Court's ruling on purely statutory grounds left that option open, and a lower court decision last fall provides a tantalizing hint of the direction the courts may follow.⁵⁸

Salim Ahmed Hamdan, who was facing trial by military commission on charges of conspiracy to commit several war crimes, filed a writ of habeas corpus challenging the commission's lawfulness. On November 8th, Judge James Robertson of the United States District Court for the District of Columbia ruled that Hamdan's trial could not proceed because the government had failed to comply with the Third Geneva Convention in making the determination that Hamdan was *not* a prisoner of war and that, since the mechanism under the Convention was not employed, Hamdan was presumed to be a prisoner of war and could only be prosecuted by a military court-martial (the same type of criminal trial forum used for our own servicemen and service women).⁵⁹

The government appealed Judge Robertson's decision to the Court of Appeals and Hamdan petitioned the Supreme Court for a writ of certiorari before judgment, which the Court denied.⁶⁰ Until the DC Circuit Court of Appeals rules on the government's appeal, the military commissions have been paused; but regardless of what the Circuit Court does in *Hamdan*, his case, or perhaps one to follow, should ultimately reach the Supreme Court. Will the Court, perhaps against the backdrop of the ongoing national and international debate over the perceived unfairness of the commissions, take

⁵⁶ *Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004). So far, two judges in the District of Columbia Circuit, where all the cases coming out of Guantanamo Bay have been consolidated, have issued conflicting rulings regarding what rights the detainees have. In *Khalid v. Bush*, 2005 WL 100924 (D.C.C.), decided on January 19, 2005, Judge Leon granted the government's motion to dismiss the claims of seven detainees because no viable legal theory existed by which he could issue a writ of habeas corpus. On the other hand, in *In re Guantanamo Detainee Cases*, 2005 WL 195356 (D.C.C.), decided on January 31, 2005, Judge Green ruled that the detainees in the cases referred to her had stated valid claims under the Fifth Amendment and that at least some of them had stated valid claims under the Third Geneva Convention.

⁵⁷ Brief of the Military Attorneys Assigned to the Defense in the Office of Military Commissions as Amicus Curiae in Support of Neither Party at 4-5, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-343).

⁵⁸ *Hamdan v. Rumsfeld*, 344 F. Supp 2d 152 (D.C. Cir. 2004), *petition for cert before judgment to the United States Court of Appeals for the District of Columbia Circuit denied*, 125 S. Ct. 972 (U.S. Jan. 18, 2005).

⁵⁹ *Hamdan*, 344 F. Supp 2d at 165.

⁶⁰ *Id.*

the opportunity to revisit the *constitutional* underpinnings of *Eisentrager* in the context of a commission conviction? If it does, whatever the ruling, it will have a major impact upon the Administration's strategy for prosecuting terrorists outside our borders.

VI. Conclusion

Quite apart from criticisms of the charter documents already discussed, the military commission proceedings, before they were halted by Judge Robertson, had clearly gotten off to a rocky start, with acknowledged errors in translation and challenges being made to several of the commission panel members, including the presiding officer himself.⁶¹ With these trials almost four years in the making, and with the imperative to prove to the world that we know what we are doing and that the proceedings will be fair, these initial missteps are, taken in best light, unfortunate. If the courts allow them to proceed, the commissions will hopefully run more smoothly and be more widely accepted by the international community. In the final analysis, though, only history can judge whether we acted prudently in using them and whether they properly achieved their purpose. That is a verdict we must await.

⁶¹ Toni Locy, *Tribunal Struggles with First Hearings*, USA TODAY, Aug. 30, 2004, at 12A; *Translation Problems at GTMO Trials*, UNITED PRESS INT'L, Aug. 26, 2004; Toni Locy, *U.S. Tribunal Could Lose Members*, USA TODAY, Sept. 15, 2004, at 5A.